

August 29, 2008

Mr. David Waldner  
Kentucky Transportation Cabinet  
Division of Environmental Analysis  
200 Mero Street  
Frankfort, KY 40622

RE: Draft Section 106 Memorandum of Agreement  
I-65 to US 31 W, Warren County, KY, KYTC Item 3-16.00  
FHWA-KY-EIS-04-2-D, NH65-1 (73)

Dear Mr. Waldner:

What follows are the comments of the Sierra Club and Karst Environmental Education and Protection, Inc. ("KarstEEP") on the draft Section 106 Memorandum of Agreement ("MOA") issued by the KYTC on August 5, 2008 regarding the proposed Kentucky Transpark I-65 interchange and connector to US 31 W in Warren County. These written comments supplement comments already in the administrative record in previous Section 106 correspondence and regarding the Draft Environmental Impact Statement ("EIS").

These comments are provided in the order of the sections of the draft MOA:

**Description of the "Undertaking," p. 1**—The description should identify the functional classification of the proposed connector road and specify that the project includes a new interstate interchange at I-65. The description also omits the connector road's intermediate interchange at US 68/80. This intermediate interchange is critical to the purported "purpose and need" for the project. KYTC's traffic analysis consultant for this project concludes that KYTC's Preferred Alternative 6 "need only be built from I-65 to US 68 to be effective...[necessitating this intermediate interchange.]" (**Traffic Analysis Report**, p. 29, Bernardin, Lochmueller and Associates, Inc.). QK4 representatives admitted this as well as the May 8, 2008 Consulting Party meeting.

**Whereas, p. 2**—The "Whereas" relating to the Advisory Council on Historic Preservation's ("Advisory Council") participation in consultation should be revised to reflect that the agency "joined consultation for the Project *due to the controversial nature of the project and the need to resolve adverse effects resulting from indirect and cumulative effects primarily associated with the Kentucky Transpark (Transpark)*" (new language bolded and italicized). The proposed language is taken directly from the Advisory Council's description of this project in its **Case Digest, Summer 2006**.

**Whereas, p. 2**—The "Whereas" relating to the karst environment should be revised to read as follows so that the geological context of the archaeological sections of the MOA is understood by anyone unfamiliar with the area:

“Whereas, *the proposed Undertaking and the Kentucky Transpark are sited within the karst plain of north Warren County.* This karst environment of the Pennyroyal sinkhole plain and the adjacent Dripping Springs escarpment is a unique resource that contains nationally significant archaeological sites, many of which contain petroglyphs and human remains, ...” (new language bolded and italicized).

**Whereas, p. 2**—Regarding the Intermodal Transportation Authority (“ITA”), this entity is an agent of the City of Bowling Green and Warren County, who also belatedly joined the Section 106 consultation process. The City and County, as real parties in interest, should be added to this “Whereas” as developers of the Kentucky Transpark and they should sign the MOA. The regulatory reference to “36 CFR Part 800.6(c)(2)(iii)” should be to “36 CFR §800.6(c)(2)(iii).”

**Stipulation I.A., pp. 3-4** (Kentucky Transpark Indirect Effects Mitigation)—

The MOA’s proposed mitigation of indirect effects from the Kentucky Transpark is wholly ineffective and unenforceable. The measures cannot be supported as meaningful and binding to protect historic standing structures and sub-surface resources given the track record of the Transpark developers—the ITA, the City of Bowling Green, and Warren County. The City of Bowling Green, a Certified Local Government under federal preservation law, and Warren County, as co-developers have allowed this destruction and harm. The resources lost or damaged include properties formerly on the site of the Magna plant, properties along the proposed rail line, and the archaeological site below the detention pond in the training center area of the Transpark.

What follows below are our comments on ways to strengthen the draft MOA. In addition, the Transpark developers should be required to fund a karst context by a donation of \$75,000 to the Kentucky Heritage Council within 45 days of execution of the MOA.

A.1. Mizpah Presbyterian Church Cemetery (Site 6). The MOA should also provide that the cemetery will never be allowed to be moved, and that, upon acquisition of the site, the City, County, and ITA are required to establish, fund, and implement a perpetual maintenance fund and plan for the historic burial ground.

A. 2. This MOA provision--that the ITA will commit to “refraining” from developing Sites 7 and 8 (the Wardlaw and Bryant farms)—is not worth the paper upon which it is written. The very language of para. 2. belies any substance to this proposal: “*should circumstances arise that would make development of Sites 7 and 8 desirable...*” It is inescapable and entirely predictable that the developers will determine that it is financially desirable to develop these sites. In that event, all the ITA has to do is consult with its co-developers, the City and County (who have a financial conflict of interest in protecting these sites since the more land that is developed the more they can re-pay the substantial taxpayer debt they have incurred in the project), and the SHPO to “identify a means of providing off-site mitigation.” The SHPO has no ability under this MOA to actually require off-site mitigation, nor do the KYTC or FHWA since they are not a part

of any process for this mitigation under the terms of the MOA. There is no role for Consulting Parties or the public to even try to hold the Transpark developers (ITA, City, County) accountable for implementing off-site mitigation. Further, allowing the ITA to control the appraisal process is untenable. The developers will simply allow the properties to suffer demolition by neglect and reduce the fair market value to reduce their financial responsibilities for off-site mitigation. Similarly, requiring that Sites 7 and 8 be locally landmarked as a possible mitigation measure to avoid demolition is problematical because the local historic preservation oversight board is an arm of the local government developers.

To be meaningful as mitigation (i.e., avoidance), the development option for Sites 7 and 8 should be stricken in its entirety from the MOA. The MOA should further provide that if the ITA acquires these sites, it, as well as the City and County, are required to establish, fund, and implement a perpetual maintenance fund and plan for these properties.

A.3.-6. Archaeological Requirements, Transpark Developers. The “Whereas” introduction to this draft MOA recognizes the fact the vast sinkhole plain within which this Undertaking and the Transpark are located contains ***nationally significant*** archaeological sites.

The responsibilities imposed on the Transpark developers in A.3.-6. are wholly insufficient to avoid, protect, and mitigate from construction impacts to these resources. Further, they fail to mitigate cumulative effects from the Transpark’s past actions in Phase I site development.

Conducting a Phase I survey of land to be developed is, at minimum, a best management practice (the “default mode”) that any developer would implement in a known archaeological deposit area and, thus, can hardly be counted as a mitigation measure. Further, in correspondence on the Draft EIS for this KYTC project, dated Oct. 4, 2007, the U.S. Army Corps of Engineers determined (as KarstEEP has argued) that the north Warren County sinkholes are likely to feature jurisdictional wetlands or be connected to jurisdictional waters. Thus, the Transpark developers will likely be required to secure Army Corps of Engineer permits for further site development and conduct Phase I work anyway as part of the Section 106 process for permitting.

Subsection A.4. outlines responsibilities of the Transpark developers for conduct of a Phase II survey (testing). This paragraph provides that a Phase II survey may first be required after a Phase I survey identifies “potentially significant resources” and the Phase I report recommends such testing. Phase II testing should be required for all resources evaluated in a Phase I survey because of the significance of the area and the resources likely to be encountered.

Second, the paragraph further provides that a Phase II survey will not be required if the Transpark developers determine that there will be no construction within 50 feet of the resource. This “buffering” is inadequate given the geology of the sinkhole plain. Many

of the sinkholes to be encountered in Phase II of the Transpark are themselves more than 50 feet in diameter. A 150-foot buffer is more responsible and warranted.

The Transpark developers should be required in this MOA to conduct a Phase II survey for all construction areas in Phase II of the project. This mitigation is warranted given the recognized level of significance of resources and the high probability that resources will be encountered. Such a survey will help mitigate harmful impacts to nationally significant archaeological sites through avoidance.

Finally, this Stipulation of the MOA must require that the Transpark developers ensure that all archaeological investigations be carried out by qualified professionals and subject to SHPO review and comment. As the MOA is currently written, there is no such requirement on the Transpark developers. Stipulation II.A. 1. (p. 4), which imposes professional qualifications on archaeological work conducted for the Undertaking on behalf of KYTC and FHWA, must be incorporated into Stipulation I. and made binding on the Transpark developers. Further, the stipulation should expressly recognize the applicability of the Kentucky Cave Protection Act, KRS 433.871-433.885, to archaeological investigations implemented pursuant to this MOA.

**Stipulation II., pp. 4-7 (Interchanges and Connector, Archaeological Requirements)**

This stipulation outlines the protocols to which the KYTC and FHWA are subject for construction of the Undertaking.

Similar to the comments provided above and for the same reasons, a Phase II should be conducted along the KYTC's preferred location both interchanges and the connector alignment. Further, and because of the high level of public and Consulting Party interest, the MOA language should be revised consistently throughout this section to require that Consulting Parties be notified of and have an opportunity to consult and comment upon all findings of investigations and evaluation, assessment of effects, and treatment. In the alternative, the MOA should be amended to require notice to and involvement of Consulting Parties that provide written notice to FHWA and KYTC of interest to participate in the archaeological phase of the Undertaking.

**Stipulation III., pp. 7-8., Unanticipated Discoveries**--For the same reasons outlined above with respect to the inadequacy of a 50-ft. buffering area in this sinkhole plain, Subsection A. should require that the KYTC ensure that all work within 150 feet around the area of discovery immediately cease.

Subsection D. should be amended to require that FHWA also notify Consulting Parties within 48 hours of anticipated discoveries.

Subsection F. should be amended to define who constitutes "the parties" that will receive the Treatment Plan. Again, this term should include Consulting Parties. The seven (7) day opportunity for review and comment is unreasonable. Given the recognized level of significance of resources likely to be encountered, a 30 (thirty) day review and comment period is warranted.

**Unresolved Visual Effects**--Several Consulting Parties requested mitigation in the MOA for adverse night-time visual effects from the lighting associated with the Undertaking as well as night-time light pollution from the Transpark's Magna plant (cumulative effect) and Phase II implementation. Requested mitigation included retrofitting or replacing the Magna lights so that light shines down and is focused where it needs to be rather than illuminating the intrinsically dark rural skies of north Warren County.

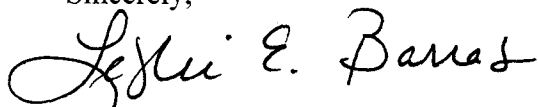
The KYTC's response that such measures are outside the scope of the Section 106 process strains credulity given the Advisory Council regulations (see, e.g., 36 CFR §800.5(a)(2)(v)) and KYTC's actual practices in resolving night-time visual pollution effects in other roadway projects, such as the Louisville Bridges Project.

**Cumulative Effects are Unaddressed**--The Section 106 regulations state that "[a]dverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time...or be cumulative." 36 CFR §800.5(a)(1). The consultation process and MOA fail to resolve cumulative effects associated with Phase I of the Transpark and the segment of I-66 planned to bisect the Transpark site. The KYTC has disclaimed any cumulative effect consultation for this proposed segment of I-66. However, the record indicates that the agency has consciously coordinated this Undertaking and the I-66 segment through utilization of common resource studies, such as the cultural resource evaluations, as well as the traffic forecasting (see, e.g., **Transpark Access Team Partnership and Scoping Workshop, September 18, 2003, Final Report, Roenker Bates Group**).

**Closing**--In closing, all pending objections of the Sierra Club and KarstEEP to this Undertaking and Section 106 process remain. These include objections over the provision of any benefit from this federally funded project to the Kentucky Transpark as well as unresolved disputes over identification of resources, the assessment of effects, and lack of transparency and integrity in the consultation process. The foregoing matters have been well documented and preserved in the administrative record for this Undertaking and have not been re-argued in this submittal.

Please include these comments in the administrative record for the above-referenced action.

Sincerely,



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Louisville, KY 40206

c: Mark Dennen, Interim KY SHPO; David Pollack, KHC; Carol Legard, ACHP; Betsy Merritt and Mike Smith, NTHP; KarstEEP Board; Betsy Bennett, Sierra Club; Gayla Cissell, WCCMG; Anthony Goodman, FHWA